95-1090

Supreme Court, U.S.
FILED
JAN 2 1996
CLERK

No. _____

IN THE

Supreme Court of the United States

October Term, 1995

STATE OF FLORIDA,

Petitioner

v.

CYNTHIA MARIE RIVERS, et al.,

Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

PETITION FOR WRIT OF CERTIORARI

ROBERT A. BUTTERWORTH
Attorney General of Florida

BELLE B. TURNER
Assistant Attorney General

OFFICE OF THE ATTORNEY GENERAL
444 Seabreeze Boulevard
Fifth Floor
Daytona Beach, FL 32118
(904) 238-4990

COUNSEL FOR PETITIONER

35 pp

QUESTION PRESENTED

WHETHER CONGRESS INTENDED TO DELEGATE TO THE STATES THE ABILITY TO ENACT A STATUTE PERMITTING ELECTRONIC INTERCEPTION TO INVESTIGATE FELONY OFFENSES RELATING TO ORGANIZED PROSTITUTION BECAUSE THE CRIME IS INHERENTLY DANGEROUS TO LIFE, LIMB, OR PROPERTY?

LIST OF PARTIES

In addition to the State of Florida and Cynthia Marie Rivers, the other parties in this case were co-appellees of Ms. Rivers' in state court appellate proceedings, and are:

Jody Lynn Bloom,

Hilary Wiggins,

Tari Tiffaney Webster, and

Carol Ann Pinhal.

Elsie Ivelisse Berkley was charged in the same information with the other five codefendants, but did not join in the state appellate proceedings.

TABLE OF CONTENTS

QUESTION PRESENTED i
LIST OF PARTIES ii
TABLE OF CONTENTS iii
TABLE OF AUTHORITIES iv
CITATIONS TO OPINIONS AND ORDERS v
STATEMENT OF BASIS OF JURISDICTION 1
PROVISIONS INVOLVED 2
STATEMENT OF THE FACTS 4
REASONS FOR GRANTING THE WRIT 6
CONCLUSION 8

TABLE OF AUTHORITIES

Cases *Page(s)*

Commonwealth v. Birdseye, 637 A. 2d 1036 (1994) 7

Michigan v. Long, 463 U.S. 1032 (1983) 6

People v. Shapiro, 409 N.E. 2d 897 (N.Y. 1980) 7

State v. Rivers, 643 So. 2d 3 (Fla. 5th DCA 1994) v

State v. Rivers, 660 So. 2d 1360 (Fla. 1995) v

CITATIONS TO OPINIONS AND ORDERS

The trial court's order granting the motion to suppress is unpublished, but is reproduced in the appendix to this petition.

The decision of the District Court of Appeal, Fifth District, is reported as *State v. Rivers,* 643 So. 2d 3 (Fla. 5th DCA 1994).

The decision of the Supreme Court of Florida is reported as *State v. Rivers,* 660 So. 2d 1360 (Fla. 1995).

No. _____

IN THE

Supreme Court of the United States

October Term, 1995

STATE OF FLORIDA,

Petitioner

v.

CYNTHIA MARIE RIVERS, et al.,

Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

PETITION FOR WRIT OF CERTIORARI

STATEMENT OF BASIS OF JURISDICTION

On March 26, 1993, the Circuit Court of the Ninth Judicial Circuit in and for Orange County, Florida, entered an order granting Respondents' joint motion to suppress evidence obtained as a result of a previously issued order authorizing the electronic interception of oral communication. The State timely filed a Notice of Appeal seeking review of that order in the District Court of Appeal, Fifth District, on April 1, 1993.

After briefs were filed and the court entertained oral argument, the district court entered its decision in the case on August 12, 1994. The State filed a Motion for Rehearing on August 25, which was denied by order dated September 29, 1994. On October 12, 1994, the State timely filed a Notice of Appeal pursuant to Florida Rule of Appellate Procedure

9.030(a)(1)(A)(ii) and Article V, § 3(b)(1) of the Florida Constitution.

The initial brief of appellant was filed in the Supreme Court of Florida on October 31, 1994. After entertaining oral argument on March 9, 1995, the Supreme Court of Florida issued its decision on July 6, 1995. The Court held that the federal wiretap statute did not authorize wiretaps to investigate prostitution related felonies as they are not intrinsically dangerous to life, limb, or property, and thus Florida's statute purporting to permit such wiretaps was invalid as in excess of the authority delegated by Congress.

The State timely moved for rehearing of this decision on July 21, 1995, which was denied by order dated October 5, 1995. Petitioner invokes this Court's jurisdiction pursuant to 28 U.S.C. § 1257(3). The highest court of Florida has declared a portion of a state statute invalid on the ground of its being repugnant to a law of the United States.

PROVISIONS INVOLVED

28 U.S.C. § 2516 (2) states:

> The principal prosecuting attorney of any state or the principal prosecuting attorney of any political subdivision thereof, if such attorney is authorized by a statute of that State to make application to a State court judge of competent jurisdiction for an order authorizing or approving the interception of wire, oral or electronic communications, may apply to such judge for, and such judge may grant in conformity with section 2518 of this chapter and with the applicable State statute an order authorizing, or approving the interception of wire, oral or electronic communications by

investigative or law enforcement officers having responsibility for investigation of the offense as to which the application is made, when such interception may provide or has provided evidence of the commission of the offense of murder, kidnapping, gambling, robbery, bribery, extortion, or dealing in narcotic drugs, marihuana or other dangerous drugs, or *other crime dangerous to life, limb, or property, and punishable by imprisonment for more than one year, designated in any applicable State statute authorizing such interception,* or any conspiracy to commit any of the foregoing offenses (emphasis added).

Section 934.07, Florida Statutes (1991):

The Governor, the Attorney General, the statewide prosecutor, or any state attorney may authorize an application to a judge of competent jurisdiction for, and such judge may grant in conformity with ss. 934.03-934.09, an order authorizing or approving the interception of wire, oral, or electronic communications by the Department of Law Enforcement or any law enforcement agency as defined in s. 934.02 having responsibility for the investigation of the offense as to which the application is made when such interception may provide or has provided evidence of the commission of the offense of murder, kidnapping, arson, gambling, robbery, burglary, theft, dealing in stolen property, *prostitution,* criminal usury, bribery, or extortion; any violation of chapter 893; any violation of the provision of the Florida Anti-Fencing Act; any violation of chapter 895; any violation of chap-

ter 815; any violation of chapter 847; any violation of s. 827.071; any violation of s. 944.40; or any conspiracy to commit any violation of the laws of this state relating to the crimes specifically enumerated above (emphasis added).

STATEMENT OF THE FACTS

The decision of the district court summarizes the facts of this case as follows:

> This matter arose out of an investigation conducted by Agent William McQue of the Orlando Police Department, who was acting as a special investigator for the Metropolitan Bureau of Investigation. McQue was investigating an alleged prostitution ring operating in Orlando. Through physical surveillance, undercover police investigation and confidential informants, McQue had cause to believe appellees were engaged in prostitution and prostitution related crimes. However, McQue believed that he could not obtain the evidence necessary to prosecute these individuals without using wiretap surveillance. As such, pursuant to section 934.09(1)(a) of the Florida Statutes, McQue filed an affidavit and application for an order authorizing the interception of wire, oral and electronic communications. After considering the application, the court issued an order authorizing the State to install and use a wiretap device on certain telephone numbers including those listed in the name of Rivers' husband and three escort businesses that Rivers operated.

> As a result of the intercepted communications, the State charged all of the respondents with violations of section 895.03, Florida Statutes (1991)(RICO), a first degree felony, and section 796.07(3)(a), Florida Statutes (1991) (prostitution), a misdemeanor....Rivers was also charged with one violation of section 796.05, Florida Statutes (1991) (deriving support from the proceeds of prostitution), a third degree felony. The respondents filed motions to suppress the evidence obtained through the use of the wiretap surveillance. The court granted the motions and this appeal ensued. *State v. Rivers,* 643 So. 2d 3, 4 (Fla. 5th DCA 1994).

Both the district court and the supreme court identified the issue as "...whether the crime of prostitution is a crime 'dangerous to life, limb or property and punishable by imprisonment of more than one year' such that it fits within the confines of 18 U.S.C. section 2516(2)." *State v. Rivers,* 660 So. 2d 1360, 1361 (Fla. 1995) [quoting *State v. Rivers,* 643 So 2d 3, 5 (Fla. 5th DCA 1994)]. Although acknowledging that Rivers, whose telephone was wiretapped, was charged with a felony prostitution offense, the supreme court found that this crime was not dangerous to life, limb, or property, even though prostitution is a high-risk activity which causes the spread of the AIDS virus. "Unquestionably, the spread of the virus that causes AIDS is a great health concern. However, this alone does not make prostitution intrinsically 'dangerous to life.'" *State v. Rivers,* 660 So. 2d at 1363. The supreme court concluded, "...section 934.07 cannot be read as authorizing wiretaps to investigate non-violent prostitution-related offenses without contravening the requirement of 18 U.S.C. § 2516(2)." *State v. Rivers,* 660 So. 2d at 1363.

In the application for wiretap order in this case, the State averred that respondents had five different telephone book

advertisements, multiple telephone lines all forwarded to one number, and dozens of employees. Petitioner contends that this evidence establishes that the prostitution offense involved in this case is characteristic of organized crime.

ARGUMENT
REASONS FOR GRANTING THE WRIT

Congress intended to delegate to states the ability to enact a statute permitting electronic interception to investigate felony offenses relating to organized prostitution because the crime is inherently dangerous to life, limb, or property.

The Supreme Court of Florida has misinterpreted controlling federal legislation in a manner that unduly restricts states from investigating organized prostitution rings, and this Court should exercise its jurisdiction in this case to remedy this error. There is a conflict between this decision and another state's decision on the same issue of law, such that this Court should accept review to resolve the conflict.

At the outset Petitioner notes that there is no question that this Court has jurisdiction. Since the state court felt compelled by what it understood to be controlling federal law in construing its own law in the manner that it did, there is no independent state law ground present in this case. *See, Michigan v. Long*, 463 U.S. 1032, 1044 (1983). The Florida courts struck the state statute permitting wiretaps in cases involving felony prostitution offenses because they incorrectly concluded that the state statute exceeded the authority delegated to it by the federal statute.

This case has far-reaching implications because it severely handicaps law enforcement's ability to investigate organized prostitution rings. Due to the nature of the crime, it is dangerous to infiltrate these prostitution rings with undercover operatives. Traditional methods of investigation are

unproductive and ineffective when combating the criminal business of prostitution.

Petitioner asserts that the decision in this case conflicts with the decision in *Commonwealth v. Birdseye,* 432 Pa. Super. 167, 637 A. 2d 1036 (1994), *rev. granted,* 649 A. 2d 667 (1994). Therein, the Pennsylvania court determined that prostitution is dangerous to life based upon the threat of AIDS. Note: *People v. Shapiro,* 409 N.E. 2d 897 (N.Y. 1980) (Court held, prostitution is not a crime dangerous to life, limb, or property; however, AIDS was virtually unknown in 1980 and was not a national health crisis at that point.) Therefore, this court should exercise jurisdiction to resolve this conflict.

Petitioner contends that a prostitution business enterprise was established in this case as related in the application for wiretap order. Respondents had five different telephone book advertisements for escort services, multiple telephone lines all forwarded to one number, and dozens of employees. A prostitution business enterprise was alleged. Had federal law enforcement officers applied to a federal judge for a wiretap order, it would have been permitted under 18 U.S.C. §2516(1). *See,* 18 U.S.C. §2516(1), 18 U.S.C. §1952. In the section immediately preceding the subsection at issue, Congress included criminal business enterprises promoting prostitution as one of the offenses that federal agents may investigate with a wiretap. The inclusion of business enterprises promoting prostitution in the list of crimes for which federal officers are permitted to obtain wiretaps is clear and express statutory intent that prostitution offenses can be investigated with a wiretap. The decision of the Supreme Court of Florida is contrary to this express Congressional intent, and is therefore erroneous.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests this Court grant summary review and reverse the opinion of the Supreme Court of Florida.

Respectfully submitted,

ROBERT A. BUTTERWORTH
Attorney General

BELLE B. TURNER
Assistant Attorney General

OFFICE OF THE ATTORNEY GENERAL
444 Seabreeze Boulevard
Fifth Floor
Daytona Beach, FL 32118
(904) 238-4990

COUNSEL FOR PETITIONER

No. _____

IN THE

Supreme Court of the United States

October Term, 1995

STATE OF FLORIDA,

Petitioner

v.

CYNTHIA MARIE RIVERS, et al.,

Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

ROBERT A. BUTTERWORTH
Attorney General of Florida

BELLE B. TURNER
Assistant Attorney General

OFFICE OF THE ATTORNEY GENERAL
444 Seabreeze Boulevard
Fifth Floor
Daytona Beach, FL 32118
(904) 238-4990

COUNSEL FOR PETITIONER

INDEX TO APPENDIX

Florida Supreme Court Order denying Rehearing, Case No. 84,610 . . . . . A-1

Opinion, Florida Supreme Court, Case No. 84,610, *State v. Rivers* A-2

Order, District Court of Appeal, Motion for Rehearing and/or Certified Question Denied, *State v. Rivers,* et. al., Case Nos. 93-810 and 93,935 . . . . . A-8

Opinion, District Court of Appeal, Case Nos. 93,810 and 93,935, *State v. Rivers* A-9

Order granting Motion to Suppress, Circuit Court, Ninth Judicial Circuit, Case No. CR92-11503 . . . . . A-15

THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,
Appellant,

v.

Cynthia Marie Rivers, et al.,
Appellees.

CASE NO. 84,610
District Court of Appeal,
5th District
Nos. 93-810; 93-935

Thursday, October 5, 1995

Appellant's Motion for Rehearing filed in the above cause is hereby denied.

GRIMES, C.J., OVERTON, SHAW, KOGAN, HARDING, WELLS AND ANSTEAD, JJ. Concur

SID J. WHITE

CLERK, SUPREME COURT

cc: Hon. Frank J. Habershaw, Clerk
Hon. Fan Carlton, Clerk
Hon. Dorothy J. Russell, Judge
Ms. Belle B. Turner
Mr. Adam B. Reiss
Mr. Ed. Leinster

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,
Appellant,

v.

CASE NO. 84,610

CYNTHIA MARIE RIVERS, ET AL.
Appellee.

HARDING, JUSTICE.

We have for review *State v. Rivers*, 643 So.2d 3 (Fla. 5th DCA 1994) wherein the Fifth District court of Appeal declared a state statute invalid. We have jurisdiction pursuant to article V, § 3(b)(1) of the Florida Constitution.

Section 934.07, Florida Statutes (1991), part of which the district court held invalid in this case, authorizes the interception of wire, oral, or electronic communications by law enforcement when the interception may provide evidence of a list of enumerated offenses.[1] The federal wiretap statute also authorizes such interception for certain enumerated offenses[2] or "other crime dangerous to life, limb, or property, and punishable by imprisonment for more than one year." 18 U.S.C. § 2516(2) (1988).

This case involves a wiretap order that was issued in the investigation of an alleged prostitution ring in Orlando. The

---

1 Section 934.07 Florida Statutes (1991), authorizes the interception of wired, oral , or electronic communications when such interception may provide evidence of the commission of certain enumerated offense, including "murder, kidnapping, arson, gambling, robbery, burglary, theft, dealing in stolen property, prostitution, criminal usury, bribery, or extortion."

2 The offenses listed in the federal statute include "murder, kidnapping, gambling, robbery, bribery, extortion, or dealing in narcotic drugs, marihuana, or other dangerous drugs." 18 U.S.C.§ 2516(2) (1988).

application for the order stated that there was probable cause to believe that the interception would provide evidence to "ongoing violations of Chapter 796, Florida Statutes, prohibiting prostitution." Based upon the intercepted communications, the State charged the appellees with RICO violations[3] and prostitution.[4] Two appellees were also charged with directing or transporting for the purpose of prostitution.[5] Rivers was additionally charged with deriving support from the proceeds of prostitution.[6]

The trial court granted the appellees' motion to suppress the evidence obtained from the wiretaps. The court concluded that "to the extent that [§] 934.07 permits the authorization of wiretaps to investigate prostitution not involving the use of force or any danger to life, limb, or property, or interstate commerce, it contravenes the requirements of Title 18 U.S.C. Section 2516(2). Consequently, the wiretaps used in this case are *invalid* and the evidence gleaned from them is hereby *SUPPRESSED.*" *State v. Rivers,* No. CR92-11503 (Fla. Cir. Ct. Mar. 26, 1993) (Order Granting Defendants' Motion to Suppress).

On appeal, the Fifth District Court of Appeal stated that "the key issue in this case is whether the crime of prostitution is a crime 'dangerous to life, limb or property and punishable by imprisonment of more than one year' such that it fits within the confines of 18 U.S.C. section 2516(2)." 643 So.2d at 5. The district court concluded that while prostitution arguably meets the first prong of being dangerous to life, limb, or property based upon the spread of Acquired Immune Deficiency Syndrome (AIDS), it does not meet the second prong because in Florida prostitution is only a sec-

---

3 § 895.03, Fla. Stat. (1991).

4 § 796.07(3), Fla. Stat. (1991)

5 § 796.07(2)(d), Fla. Stat. (1991)

6 § 796.05, Fla. Stat. (1991)

ond-degree misdemeanor punishable by imprisonment not to exceed sixty days. The court also concluded that while the charge of deriving support from the proceeds of prostitution satisfies the second prong,[7] it fails the first requirement because it is not dangerous to life, limb, or property. Thus, the district court agreed with the trial court that the federal statute preempted Florida's authority to include the crime of prostitution in its wiretap statute and affirmed the order suppressing the evidence. *Id.*

In response to the State's argument that the RICO charges made the wiretap authorization valid in this case, the district court noted that the request for the wiretap order was specifically based on acts in violation of chapter 796, entitled "Prostitution," and not on alleged RICO violations. The RICO charges only materialized after the State obtained evidence through intercepting communications pursuant to the wiretap order. *Id.* at 6.

Additional offenses discovered during the course of a proper intercept may be prosecuted regardless of the nature of the offense or the prescribed punishment. *United States v. Pacheco*, 489 F. 2d 554, 564 (5th Cir. 1974), *cert. denied*, 421 U.S. 909, 95 S. Ct. 1558, 43 L. Ed. 2d 774 (1975). However, evidence of other crimes revealed as the result of an invalid wiretap cannot redeem as otherwise invalid authorization. In this case where the request was specifically based on violations of chapter 796, RICO violations that were revealed as a result of the intercepted communications would not validate the original wiretap if prostitution-related offenses are not subject to wiretap under the federal statute.

Title III of the Omnibus Crime Control and Safe Streets Act of 1968 created a chapter entitled "Wire Interception

---

7 Deriving support from the proceeds of prostitution is a third-degree felony, punishable by a term of imprisonment not exceeding five years. *See* §§ 775.082(3) (d), 796.05 Fla. Stat. (1991)

and Interception of Oral Communications." 18 U.S.C. §§ 2510-20 (1988 & Supp. 1933) This chapter was intended to prohibit "all wiretapping and electronic surveillance by persons other than duly authorized law enforcement officials engaged in the investigation of specified types of major crimes after obtaining a court order." S.Rep, No. 1097, 90th Cong., 2d Sess. (1968), *reprinted in* 1968 U.S.C.C.A.N. 2112, 2113 [hereinafter S. Rep.]. By passage of this measure, Congress preempted the field of the interception of wire communications under its power to regulate interstate communications. *State v. McGillicuddy*, 342 So.2d 567, 568 (Fla. 2d DCA 1977). As explained in the Senate report, the federal wiretap statute "envisions that States would be free to adopt more restrictive legislation, or no legislation at all, but not less restrictive legislation." S. Rep., *supra*, a 2187; *accord McGillicuddy*, 342 So.2d at 568. This Court has also held the Florida's wiretap statute must be strictly construed and narrowly limited in its application by the specific provisions set out by the legislature. *In re Grand Jury Investigation*, 287 So.2d 43 (Fla.1973)

The federal wiretap statute enumerates a number of offenses where wiretaps are authorized, and also includes a general category of any "other crime dangerous to life, limb, or property, and punishable by imprisonment for more than one year." 18 U.S.C. § 2516 (2). While Florida's counterpart is quite similar to the federal statute, it enumerates a more expansive list of offenses where wiretaps are authorized, including prostitution. § 934.07, Fla.Stat. (1991). Thus, the district court correctly identified the key issue as whether prostitution falls within the "dangerous to life" general category of the federal statute.

Courts in several other jurisdictions have concluded that prostitution is not a crime dangerous to life, limb, or property under the federal wiretap statute. *See people v. Shapiro*, 50 N.Y.S. 2d 422, 409 N.E. 2d 897 (1980); *United States v. Millstone Enters., Inc.*, 684 F. Supp. 867, 870 (W.D. Pa.),

rec'd. on other grounds, 864 F. 2d 21 (3d Cir. 1988); *but see Commonwealth v. Birdseye,* 432 PaSupp. 167, 637 A.2d 1036, 1040-41 (finding that prostitution is dangerous to life based upon the threat of AIDS) *review granted,* 538 Pa. 664, 649 A.2d 667 (1994).

In *Shapiro*, the New York Court of Appeals determined that allegations of sexual peals determined that allegations of sexual abuse and the promotion of prostitution involving minors "do not come within the intendment of the Federal Statute because they cannot be said to be 'crime(s) dangerous to life (or) limb'." 431 N.Y.S.2d at 432, 409 N.E. 2d at 907. In *Millstone,* a federal district court reached the same conclusion that "[p]rostitution was not within Congress's intention of 'other crimes dangerous to life, limb or property,' particularly where...there has been no allegations [sic] of associated violence or threat of violence." 684 F. Supp. at 871.

We agree with the conclusion of the *Shapiro* and *Millstone* courts that Congress did not intend to include prostitution in the "dangerous to life, limb or property" category. As the *Shapiro* court noted, the drafters of the statute "did not keep their intentions secret." 431 N.Y.S.2d at 431, 409 N.E. 2d at 907. The drafters specifically stated that each offense enumerated the statute was chosen "either because it is intrinsically serious or because it is intrinsically serious or because it is characteristic of the operations of organized crime." S.Rep., *supra*, at 2186. Under the statutory construction rule of ejusdem generis, the general category of other crimes "dangerous to life, limb, or property, and punishable by imprisonment for more than one year," must be construed as applying only to crimes of the same kind as those precisely stated in the statute. Thus, the "dangerous to life" general category refers only to those crimes that are "intrinsically serious" or characteristic of operations of organized crime. *Shapiro*, 431 N.Y.S.2d at 432, 409 N.E. 2d at 907.

The State argues that prostitution is dangerous to life because the virus that causes AIDS is sexually transmitted. Thus, the State contends, prostitution-related felonies such as deriving support from the proceeds of prostitution meet both prongs of the general category: dangerous to life and punishable by imprisonment for more than one year.

Unquestionably, the spread of the virus that causes AIDS is a great health concern. However, this alone does not make prostitution intrinsically "dangerous to life." Moreover, Congress specifically provided that the "dangerous to life" general category "is intended to exclude such offenses as fornication and adultery, which do not involved danger to life, limb, or property." S.Rep., *supra*, at 2187.

While we find that prostitution in general in not "dangerous to life," we agree with the *Millstone* and *Shapiro* courts that wiretaps could be authorized in conformance to the the federal statute where the allegations of prostitution-related offenses involve violence or the threat of violence. *See Millstone,* 684 F. Supp. At 870-71; *Shapiro,* 431 N.Y.S. 2d at 431-33, 409 N.E. 2d at 907-08. However, under the circumstances of this case, section 934.07 cannot be read as authorizing wiretaps to investigate nonviolent prostitution-related offenses without contravening the requirements of 18 U.S.C. § 2516(2). Thus we agree with the District Court that the trial court properly suppressed the evidence obtained from the wiretaps in this case.

For the reasons expressed above, we approve the decision below.

It is to ordered.

GRIMES, C.J., and OVERTON, SHAW, KOGAN and ANSTEAD, JJ., concur.

WELLS, J. Concurs in result only.

IN THE DISTRICT COURT OF APPEAL
FIFTH DISTRICT, STATE OF FLORIDA

STATE OF FLORIDA,
Appellant,

v. CASE NO. 93-810, 93-935

CYNTHIA MARIE RIVERS,
TARI TIFFANY WEBSTER,
AND CAROL ANN PINHAL,
AND JODY LYNN BLOOM,
AND HLARY WIGGINS,
Appellee.

September 29, 1994

BY ORDER OF THE COURT:

Ordered that Appellant's MOTION FOR REHEARING/REHEARING EN BANC AND/OR CERTIFIED QUESTION, filed August 25, 1994, is denied.

FRANK J. HABERSHAW, CLERK

cc: Office of Attorney General—Daytona
Ed Leinster, Esq.
Adam B. Reiss, Esq.

IN THE DISTRICT COURT OF APPEAL
FIFTH DISTRICT, STATE OF FLORIDA

STATE OF FLORIDA,
Appellant,

v. CASE NO. 93-810; 93-935

CYNTHIA MARIE RIVERS, ET AL.
Appellee.

GOSHORN, Judge.

The State appeals from the trial court's order granting the appellees' motion to suppress evidence obtained through an authorized wiretap. We affirm.

This matter arose out of an investigation conducted by Agent William McQue of the Orlando Police Department, who was acting as a special investigator for the Metropolitan Bureau of Investigation. McQue was investigating an alleged prostitution ring operating in Orlando. Through physical surveillance, undercover police investigation, and confidential informants, McQue had cause to believe appellee were engaged in prostitution and prostitution-related crimes. However, McQue believed that he could not obtain the evidence necessary to prosecute these individuals without using wiretap surveillance. As such pursuant to § 934.09(1)(a) of the Florida Statutes, McQue filed an affidavit and application for an order authorizing the interception of wire, oral, and electronic communications. After considering the application, the court issued an order authorizing the State to install and use a wiretap device on certain telephone numbers including those listed in the name of appellee Rivers' husband and three escort businesses the Rivers operated.

As a result of the intercepted communications, the State charged all the appellees with violations of § 895.03, Florida Statutes (1991) (RICO), a first-degree felony, and § 796.07(3)(a), Florida Statutes (1991) (prostitution), a misdemeanor. Additionally, two of the appellees were charged with violations of § 796.07(2)(d), Florida Statutes (1991) (directing or transporting for the purpose of prostitution), a misdemeanor. Rivers was also charged with one violation of § 796.05, Florida Statues (1991) (deriving support form the proceeds of prostitution), a third-degree felony. The appellees filed motions to suppress the evidence obtained through the use of the wiretap surveillance. The court granted the motions and this appeal ensued.

We begin our analysis by reviewing the applicable statutory provisions relating to the interception of communications. Section 934.07, Florida Statues (1991) states in relevant part:

> [A]ny state attorney may authorize an application to a judge to competent jurisdiction for, and such judge may grant...an order authorizing or approving the interception or wire, oral, or electronic communications by...any law enforcement agency...having responsibility for the investigation of the offense... of murder, kidnapping, arson, gambling, robbery, burglary, theft, dealing in stolen property, *prostitution*, criminal usury, bribery, or extortion...or any conspiracy to commit any violation of the laws of this state relating the crimes specifically enumerated above.

(emphasis added.) The federal counterpart to Florida's wiretap statute provides:

> The principal prosecuting attorney of any State,...may apply to such judge for, and such

> judge may grant...an order authorizing, or approving the interception or wire, oral, or electronic communications by investigation or law enforcement officers having responsibility for the investigation of the offense as to which the application is made, when such interception may provide or has provided evidence of the commission of the offense of murder, kidnapping, gambling, robbery, bribery, extortion, or dealing in narcotic drugs, marihuana or other dangerous drugs, or *other crime dangerous to life, limb or property, and punishable by imprisonment for more than one year,* designated in any application State statute authorizing such interception, or any conspiracy to commit any of the foregoing offenses. 18 U.S.C. § 2516(2) (West. Supp.1994) (emphasis added).

While states may enact more stringent standards regarding the use of wiretaps within its borders, states may not allow wiretapping which exceeds the boundaries of the federal statute. *State b. Aurilio*, 366 So.2d 71 (Fla. 4th DCA 1978), *cert. Denied,* 376 So.2d 76 (Fla. 1979); *State v. McGillicuddy*, 342 So.2d 567 (Fla. 2d DCA 1977). See also *Sanders v. State,* 57 Md.App. 156. 469 A.2d 476, 482 (stating that "[w]hile standards for state law enforcement officers regarding communications interceptions may be more restrictive of personal privacy rights than the federal provisions, such state standards may not supersede federal law"), *cert. Denied,* 299 Md. 656, 474 A.2d 1345 (1984). As such, Florida's wiretap statute must be read in conjunction with its federal equivalent and if portion of the Florida law is broader than the federal law, that part of the statute is invalid. See *Commonwealth v. Dorty,* 345 Pa. Supper. 374, 498 A.2d 870, 877 (1985) (finding that those parts of the state law which expand upon the federal wiretap statute are severable and

do not render the entire law unconstitutional), *cert. denied*, 479 U.S. 853, 107 S. Ct. 185, 93 L.Ed.2d 119 (1986). *See also Small v. Sun Oil Co.*, 222 So.2d 196, 199 (Fla. 1969) (Finding that courts may preserve the constitutionality of any act by eliminating an invalid portion under the severability rule). Therefore, the key issue in this case is whether the crime of prostitution is a crime "dangerous to life, limb or property and punishable by imprisonment of more that one year" such that it fits within the confines of 18 U.S.C. § 2516(2).

The State argues that the outbreak of the AIDS epidemic makes prostitution a crime "dangerous to life." Additionally, it asserts that, because each of the appellee was charged RICO, and Rivers was charged with deriving support form the proceeds of prostitution,[1] then Florida's wiretap statute does not contravene 18 U.S.C. § 2516(2). Therefore, the State contends that the legislature did not violate the supremacy clause in enacting the statute.

The plain and unambiguous language of federal statute, § 2516(2), requires two findings before one allegedly involved in a crime not specifically identified may be the subject of a wiretap investigation. First, the crime must be dangerous to life, liberty, or property; and second, it must be punishable by more than one year in prison. While the crime of prostitution arguably meets the first prong, it fails the second because in Florida, prostitution is a second degree misdemeanor punishable by imprisonment not to exceed 60 days.[2] Although the State correctly points out the appellee Rivers' charge, deriving support from the proceeds of prostitution,

---

1 Each of these crimes is a felony punishable by imprisonment of more than one year.

2 *See* § 796.07(5), Fla. Stat. (1991). It should be noted that, effective October 1, 1993, this section was renumbered to include a harsher penalty for a subsequent offense. *See* Ch. 93-227, § 5, at 2341, Laws of Fla. Even under this change, however, prostitution is not punishable by imprisonment of more than one year.

meets the second requirement, it fails the first because it is not "dangerous to life, limb or property." Accordingly, the trial court correctly found that the Federal Legislature preempted the authority of the State of Florida to include the crime of prostitution in its wiretap statute.[3]

Finally, the State asserts that, because each of the appellees was charged under RICO where the predicate offense as prostitution, the RICO violation makes the wiretap authorization in the present case valid. However, the request for the

---

3 The Federal Legislature did provide a manner in which to utilize wiretapping devices to investigate prostitution. Section 2516(1) permits intercepting wire or oral communications to investigate any offense punishable under 18 U.S.C. § 1952. That section states:

> (a) Whoever travels in interstate or foreign commerce or uses the mail or any facility in interstate or foreign commerce, with the intent to—
>
> (1) distribute the proceeds any any unlawful activity; or
>
> (2) commit any crime of violence to further any unlawful activity; or
>
> (3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity, and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.
>
> (b) As used in this section,..."unlawful activity" means (1) any business enterprise involving...prostitution offenses in violation to the laws of the State in which they are committed...thus, under federal law, wiretapping may be permitted to investigate prostitution only if the alleged activities involve interstate or foreign commerce. *Sub judice*, because there was no evidence of interstate activity, this statute cannot be used as a basis for justifying the State's actions. Furthermore, the State did not meet the application requirements enumerated in 18 U.S.C. § 2516(1) and 1952 are inapplicable to the present case.

wiretap order was not based on RICO. Rather, State specifically sought permission to intercept wire communications relative to acts allegedly in violation of Chapter 796 of the Florida Statutes, entitled "Prostitution." The RICO charges materialized only after the State obtained evidence through intercepting communications pursuant to the wiretap order. The test is the sufficiency of the allegations contained in the request for the wiretap authorization, not the evidence of other crimes discovered as a result of the intercepted communication.

AFFIRMED.

W. SHARP and DIAMANTIS, JJ., concur.

IN THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT, IN AND FOR ORANGE COUNTY, FLORIDA

STATE OF FLORIDA,
Plaintiff,

v. CASE NO. CR92-11503

CYNTHIA MARIE RIVERS,
TARI TIFFANY WEBSTER,
AND CAROL ANN PINHAL,
Defendants.

ORDER GRANTING DEFENDANTS' MOTION TO SUPPRESS

THE COURT HAVING REVIEWED the state and Federal law and the case law provided by counsel and being otherwise apprised of the facts and law of this case hereby finds

SUPPORTING LAW

1. Title 18 U.S.C. § 2516(2) enumerates the types of charges in which the states may obtain surveillance orders; to wit: murder, kidnapping, gambling, robbery, bribery, extortion, or dealing in narcotic drugs, marijuana, or other dangerous drugs or other crimes dangerous to life, limb, or property, and punishable by imprisonment for more than one year.

2. Title 18 U.S.C. § 1952, entitled "Interstate and foreign travel or transportation in aid of racketeering enterprises" provides (a) whoever travels in interstate or foreign commerce or uses the mail or any facility in interstate or foreign commerce [emphasis added], with the intent (1) to distribute

the proceeds of any unlawful activity; or (2) commit any crime of violence to further any unlawful activity; or (3) otherwise promote...any unlawful activity....Section (b) defines "unlawful activity" as used in this section [emphasis added] as (1) any business enterprise involving gambling, liquor..., narcotics..., or prostitution [emphasis added?] offenses in violation of the laws of the State in which they are committed or of the United States...

3. U.S.C. § 1961, 9162, and 1963 define "racketeering activity" and refer to prohibited activities which affect interstate or foreign commerce.

4. Based on their reading of the Federal statute, the Florida Legislature amended Florida Statute 934.07 to provide for the authorization for interception of wire, oral, or electronic communications that may provide evidence of the commission of the offense of murder, kidnapping, arson, gambling, robbery, burglary, theft, dealing in stolen property, prostitution, criminal usury, bribery, or extortion...

5. The states may not exceed the parameters of permissible State regulation set out under Title 18 U.S.C. 2516(2) without running afoul of the Supremacy Clause (U.S. Const. Art. VI, Cl.2).

CONCLUSION

BASED ON THE STATE AND FEDERAL statutes cited above, the Federal code does not authorized wiretap for prostitution unless it involves interstate or foreign commerce. There is no evidence of interstate activity in the case at bar. Further, considering the three classifications of generic criminal activity subject to wiretap; i.e., national security, intrinsically dangerous activities, or activities characteristic of organized crime, this court can find no basis on which to establish such a connection in this case. Nothing in the

Authorization for Application for Interception of Wire, Oral, and Electronic Communications, the *Application for Pen Register and Trap and Trace Device Authorization,* nor the *Order Authorizing the Interception of Wire, Oral, and Electronic Communications* even alludes to this prostitution ring being dangerous or that it is characteristic of "organized crime" as the term is generally interpreted. No doubt the ? are organized and the activity is illegal, by that by itself is insufficient. The R.I.C.O. charge (Count I) and the Deriving Support from the Proceeds of Prostitution charge against Defendant Cynthia Rivers only (Count II) carry a possible penalty greater than one year; however, the crime must also fit within those crimes enumerated in Title 18 U.S.C. 2516(2). The State stresses the increased thereat of contracting HIV or AIDS with increase of sexual partners in this prostitution business. That certainly is a possibility, but this court does not find that threat to rise to the level of crimes dangerous to life, limb, and property defined in title 18 § 2516(2). To do so would include promiscuous men and women who have numerous sexual partners, and this Court would not want to be in the position of determining how many partners within what period of time would rise to a level that would warrant a wiretap because of the danger to life.

In the case of *people v. Lagano*, 432 N.Y.S. 2d 798 (1980) and *people v. Ardito* 431 N.Y.S. 2d 311 (1980), two usury cases out of New York, the Supreme Court of Bronx County upheld the wiretap not because of the usury charge, but because the affidavit in support of the wiretap application contained specific references to "thinly veiled threats of violence [emphasis added?] made by the conspirators. Further, other than coercion, there would be no other way to collect on such a debt. The Court Stated that "extortion is usury's necessary adjunct, and this Court cannot blind itself to such reality." This they held in spite of the fact that usury by itself, a consensual act, would not warrant issuance of wiretap order.

In *People v. Shapiro*, 431 N.Y.S. 2d 422 (1980), the Court of appeals of New York held that, although the wiretap would be valid under the state law, it was invalid because it exceeded the bounds set by the governing Federal wiretap statute. In that case the defendant was not just a "john" in a prostitution case as the State implies. He was charged in a 64-count information involving a course of homosexual sodomitic acts of various occasions over 17 months with eight different boys under 17 years of age whom he paid for the sex, plus he was charged with promoting such activity in two other cases with two other young boys. In *Shapiro*, the Court made frequent reference to senate Report No. 1097. The court stated in part:

> The provisions of title 3 do more than codify bare constitutional requisites; they manifest a Congressional design to protect the privacy of wire and oral communications by confining Sate authorization for eavesdropping by wiretap to what in Congress; view are appropriate and compelling circumstances....[T]he crimes considered serious enough to warrant investigation by wiretap, namely "murder, kidnapping, gambling, robbery, bribery, extortion, or dealing in narcotic drugs, marijuana or other dangerous drugs, or other crime dangerous to life, limb or property, and punishable by imprisonment for more than one year, designated in any applicable State statute authorizing such interception, or any conspiracy to commit any of the foregoing offenses"....The list was to represent a class of major offenses that were either "intrinsically serious or *** [were] characteristic of the operations of organized crime"...[w]ith the exception of gambling and bribery, the designated crimes all involve harm or the substantial threat of harm to the per-

> son, a "limitation [expressly] intended to exclude such offenses as fornication and adultery" from the permissible scope of electronic surveillance....These criminal activities involved only consensual conduct, to which, as already indicated, the legislative history tells us the Federal statute does not extend the reach of permissible wiretapping.

The Court further stated that

> while it is possible for such crimes to involve the use of forcible compulsion, the state wiretapping statute is not framed with this particularity, and there was no indication from which the police could have reasonably suspected that Shapiro's alleged criminality partook in any measure of either violence or coercion.

The facts in the instant case are comparable to *Shapiro.*

THIS COURT, THEREFORE, FINDS that to the extent that Florida Statute 934.07 permits the authorization of wiretaps to investigate prostitution not involving the use of force or any danger to life, limb, or property, or interstate commerce, it contravenes the requirements of Title 18 U.S.C. § 2516(2). Consequently, the wiretaps used in this case are invalid and the evidence gleaned from them is hereby SUPPRESSED.

DONE AND ORDERED THIS 26th day March 1993, in Chambers, in Orlando, Orange County, Florida.

HONORABLE DOROTHY J. RUSSELL
CIRCUIT COURT JUDGE

cc: State Attorney's Office—Orlando
Attn: Joseph A. Cocchiarella
mailed
Ed Leinster, Esq.—Orlando
mailed